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Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1313

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION,

Petitioner,

vs.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT CWA IN SUPPORT OF PETITIONER.

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OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 486 F. 2d 863 (7th Cir. 1973), App. 63-71. The Decision and Order of the National Labor Relations Board which was reviewed by the Court of Appeals is reported at 197 NLRB No. 127 (1972); App. 51-55. The Decision and Determination of Dispute of the National Labor Relations Board, which is the Board's determination of the underlying jurisdictional dispute, is reported at 191 NLRB No. 122 (1971), App. 9-24.

JURISDICTION.

This case is before the Court pursuant to 28 U. S. C. § 1254(1), a petition for writ of certiorari having been granted by order of May 13, 1974.

QUESTIONS PRESENTED.

1. Whether the National Labor Relations Board's determination of a jurisdictional dispute under § 10(k) of the Labor Management Relations Act is a final order and consequently within the reach of § 554 of the Administrative Procedure Act.

2. Whether the hearing officer in a § 10(k) jurisdictional dispute case before the National Labor Relations Board participates or advises in the decision to such an extent that he is subject to § 554(d) of the Administrative Procedure Act.

3. Whether Local 134 waived its right to claim that § 554 (d) of the Administrative Procedure Act applied to the proceedings before the Board by failing to object to obvious departures from other sections of that Act at the outset of the § 10(k) hearing, or by failing to appeal from the Board's determination of the § 10(k) dispute.

4. Whether there was a commingling of judicial and prosecutorial functions which violated § 554(d) of the Administrative Procedure Act where an attorney acted as hearing officer in a hearing under § 10(k) of the Labor Management Relations Act, and months later was assigned to prosecute a related unfair labor practice case.

STATUTES AND REGULATIONS INVOLVED.

The following sections of the Labor Management Relations Act (LMRA), 29 U. S. C. § 151, *et seq.* (1970), are applicable to this case and are appended verbatim to this petition as Appendix 1:

§ 3(d)	29 U. S. C. § 153(d) (1970)
§ 8(b)(4)(ii)(D)	29 U. S. C. § 158(b)(4)(ii)(D) (1970)
§ 10(a)	29 U. S. C. § 160(a) (1970)
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§ 10(j)	29 U. S. C. § 160(j) (1970)
§ 10(k)	29 U. S. C. § 160(k) (1970)
§ 10(l)	29 U. S. C. § 160(l) (1970)

The following sections of the Administrative Procedure Act (APA), 5 U. S. C. § 551, *et seq.* (1970), are applicable and are appended verbatim as Appendix 2:

§ 551(6) and (7)	5 U. S. C. § 551(6) and (7) (1970)
§ 554(d)	5 U. S. C. § 554(d) (1970)
§ 556(a) and (b)	5 U. S. C. § 556(a) and (b) (1970)

Section 101.34 of the National Labor Relations Board's Statements of Procedure, 29 C. F. R. § 101.34 (1973), is applicable to this case and is appended verbatim as Appendix 3.

STATEMENT OF THE FACTS AND OF THE CASE.

Statement of the Facts.

The Communications Equipment and Systems Division of International Telephone and Telegraph Corporation (the Employer or the Company) entered into a contract with the Village of Elk Grove, Illinois, to sell and install a private telephone system for the Elk Grove Village administration offices which were under construction.[1] The Employer subcontracted the initial phase of this work to an electrical construction company whose employees were represented by Local 134, International

1. The facts are stated here as found by the Board and by the Court of Appeals. Since Local 134 has not cross-appealed to this Court, there is no issue of fact at this time.

Brotherhood of Electrical Workers, AFL-CIO (Local 134). The bulk of the work was to be accomplished by employees of the Employer who are represented for collective bargaining purposes by the Communications Workers of America (CWA).

A business agent of Local 134 objected to this work assignment, telling officials of the Employer that Local 134 did all telephone and private switchboard installation and maintenance work in Cook County, Illinois. The business agent stated that CWA would not install telephone equipment in Cook County and that "[W]e'd better get that work or there will be trouble."

When employees of the Employer represented by CWA appeared at the job site to begin their work, the Local 134 steward and other members of Local 134 employed by other contractors left the job site and remained away from their work until the Employer agreed that no CWA employees would remain on the job. Thereafter, CWA employees were excluded from the job site. Only after the members of Local 134 had completed their work were CWA employees able to return to complete the balance of their work.

PROCEEDINGS BEFORE THE NATIONAL LABOR RELATIONS BOARD.

The Employer then filed an unfair labor practice charge alleging that Local 134 had violated Sections 8(b)(4)(i) and (ii)(D) of the National Labor Relations Act (hereafter Labor Management Relations Act or LMRA), 29 U. S. C. § 158(b)(4)(i) and (ii)(D). The gravamen of the unfair labor practice charge was that Local 134 threatened the Employer and induced employees of other, neutral employers to refuse to work for the purpose of forcing the Employer to assign particular work to members of Local 134 rather than to Company employees represented by CWA.

After investigating the charge, the Board held a hearing under § 10(k) of the LMRA. This hearing was presided over by an

attorney who was an employee of the regional office of the Board and who was designated to act as a hearing officer. Upon conclusion of the hearing the record was transferred to the Board. In accordance with practice before the Board in § 10(k) hearings, no briefs were filed with the hearing officer, but only with the Board. The Board, after receiving briefs filed by the parties, issued its detailed Decision and Determination of Dispute. App. 9. The Board awarded the disputed work to employees of the Company represented by CWA. App. 21. Thereafter a motion to reconsider was filed by Local 134 which was denied. Local 134 did not contend during any phase of the § 10(k) proceeding that the APA was applicable, nor did it raise any objection claiming a violation of the APA. Local 134 did not attempt to appeal to the Court of Appeals from the Decision and Determination of Dispute.

The second phase of the matter before the Board consisted of an unfair labor practice proceeding, based upon the original charge which had lain dormant during the § 10(k) proceedings. When Local 134 indicated that it would not abide by or accept the Board's decision in the § 10(k) proceeding, the General Counsel issued a Complaint, charging that an unfair labor practice had been committed.

The attorney assigned to represent the General Counsel and to prosecute the unfair labor practice, by chance, turned out to be the same attorney who had presided as hearing officer at the § 10(k) hearing eight months earlier. At the outset of the unfair labor practice hearing, Local 134 objected and for the first time argued that the Administrative Procedure Act (APA) applied. The objection was based solely on the grounds that the same attorney who had previously been the hearing officer in the § 10(k) hearing was now acting as prosecutor.

The unfair labor practice hearing was held before an Administrative Law Judge (then called a Trial Examiner). After briefs were submitted, the Judge determined that Local 134 had indeed committed the unfair labor practice. App. 34. On appeal, the Board affirmed. App. 51.

PROCEEDINGS IN THE COURT OF APPEALS.

Thereafter Local 134 filed a petition to review the Board's order, and the Board filed a petition seeking enforcement.

The Court of Appeals for the Seventh Circuit affirmed most of the Board's Decision. It affirmed the Board's award of the work in the § 10(k) decision:

> "Testimony at the § 10(k) hearing clearly indicates that employees represented by CWA customarily install and test equipment similar to that involved here in Cook County, and the Board determined that by area, employer, and industry practice and by skill and training, the CWA employees were more entitled to perform the disputed work than employees of Local 134." App. 66.
>
> "We certainly cannot say that the Board's decision was not supported by the controlling facts of the case." App. 68.
>
> "In these circumstances the employer was 'trapped' in a jurisdictional dispute between the two contesting unions. Stated another way, the Local 134 activities complained of did not involve a primary dispute with the employer over fulfillment of its contract for work customarily performed, but were secondary pressures designed to influence the employer concerning a jurisdictional union dispute. Such is the very activity § 8(G)(4)(D)(b)(4)(D) was intended to prohibit." App. 67-68.

Even though it agreed that Local 134 had violated the Act, the Court of Appeals denied enforcement of the Board's decision. The court concluded that, because the hearing officer in the § 10(k) proceeding subsequently served in a prosecutorial capacity at the § 8 unfair labor practice hearing, there was a violation of § 5(d) of the APA. 5 U. S. C. § 554(d). On this basis the court denied enforcement of the Board's order.

SUMMARY OF ARGUMENT.

Congress sought to regulate jurisdictional disputes by enacting § 10(k) of the Labor Management Relations Act. Under the scheme of the Act, there is no provision for immediate enforcement of the Board's decision in a § 10(k) proceeding. The only way to implement the § 10(k) decision is through an unfair labor practice hearing, after which, as here, the Board may seek enforcement or any party may seek to review the Board's order. Consequently, the § 10(k) decision is not final. If it is not final, it is not, by definition, an adjudication under the Administrative Procedure Act, and § 554(d) of the APA does not apply. Since the court below relied upon § 554(d)'s proscription against commingling of judicial and prosecutorial functions, its refusal to enforce the Board's order was error.

A further reason why § 554 of the APA does not apply to the hearing officer in a § 10(k) proceeding is because he merely presides over a non-adversary, fact-gathering hearing. He does not participate in or advise in the decision of the Board. Consequently his function is not regulated by § 554(d) of the APA which by its terms affects only prosecutors who participate or advise in the decision. In the present case the Board alone determined the jurisdictional dispute; the hearing officer did not in any way participate in the decision or advise the Board.

If the court below is upheld, then the settlement of jurisdictional disputes would be delayed, in contravention of the desire of Congress to expedite such settlements. The APA applies only if the § 10(k) decision is a final one. But, if it is final, an appeal would have to be allowed at that point, pursuant to § 10(f) of the LMRA. This would allow not one but two appeals to a disappointed party, thereby greatly delaying conclusion of the jurisdictional dispute.

Local 134 has waived its right to assert that the proceedings below were governed by the APA, since Local 134 did not object at the time of the § 10(k) hearing on the grounds that

the hearing officer was not an Administrative Law Judge and on the grounds of other departures from the APA (§§ 556, 557). Also Local 134 did not appeal from the Board's § 10(k) decision, which it had a right to do if the decision was final, as now claimed.

Even if we assume, *arguendo*, that § 554(d) of the APA applies and prevents a person who operates on the level of a § 10(k) hearing officer from also performing prosecutorial functions, Local 134 was not prejudiced. Since the hearing officer at the time of the § 10(k) hearing did not know that he would later be a prosecutor, his role as hearing officer or judge was impartial. The APA seeks to guarantee an impartial judge, not to regulate prosecutors. Since the hearing officer here was impartial, there was no prejudice to Local 134 and no reason to deny enforcement of the Board's order.

ARGUMENT.

I. Since the Board's § 10(k) Determination Was Not Final, It Was Not an Adjudication, and, Therefore, § 554 of the APA Does Not Apply.

The Court of Appeals agreed with the Board that Local 134 had violated the Act, but the court refused to enforce the Board's order on a highly technical ground based upon a misreading of the Administrative Procedure Act. The Court of Appeals relied upon a crucial but unwarranted assumption:

> "It is apparently admitted that § 554 [of the APA] applies to [LMRA] § 10(k) hearings." App. 70.

This assumption was crucial, because it largely decided the case. It was unwarranted, because neither the Employer, the Board, nor CWA had ever made this admission. Although these three parties called this mistake to the court's attention by filing petitions for rehearing, the petitions were denied without further opinion. This issue is too important to be decided by an admission which was never made.

Section 554 of the APA does not apply to all agency proceedings. It only "applies, according to the provisions thereof, in every case of adjudication. . . ." 5 U.S.C. § 554(a) (1970). An adjudication is defined as agency process for the whole or a part of a "final disposition." APA § 551(6), (7). It is clear, however, that the § 10(k) decision under the LMRA is not a final disposition. This Court explicitly pointed this out in *NLRB* v. *Plasterers Union No. 79*, 404 U.S. 116 (1971):

> "But the § 10(k) decision standing alone, binds no one. No cease-and-desist order against either union or employer results from such a proceeding. . . ." 404 U.S. at 126.

Obviously, if the § 10(k) decision binds no one, it is not a final decision and not an "adjudication" that would be subject to the APA. Nevertheless, the Court of Appeals, while acknowledging this Court's language in the *Plasterers* case, proceeded to brush it aside in order to arrive at the erroneous conclusion that § 554 is applicable to a § 10(k) proceeding. The Court of Appeals, notwithstanding this Court's language, thought it "an over-simplification to say that the § 10(k) hearing has no binding effect." App. 69. This is a play on words. A decision that binds no one cannot have significant binding effect. More important, a decision that binds no one should not be considered final under the APA.

A decision which is directly contrary to that of the court below was reached in *Bricklayers, Masons and Plasterers* v. *NLRB*, 475 F.2d 1316 (D.C. Cir. 1973), where, in a carefully reasoned decision, the United States Court of Appeals for the District of Columbia held "that a determination in a Section 10(k) proceeding is not an adjudication within the meaning of 5 U.S.C. Section 544." 475 F.2d at 1318-19. The applicability of the APA was the major point at issue there, and the opinion of the District of Columbia Circuit is devoted almost entirely to analyzing this problem and concluding that the APA does not apply. By contrast, the Seventh Circuit in the case at bar assumed incorrectly that this crucial point was "admitted."

The District of Columbia Circuit expressly held that even though a factual question is resolved, the § 10(k) decision is not final.

> "The scheme for and consequence of a Section 10(k) hearing thus are not adjudicatory, notwithstanding that in reaching its determination the Board resolves a factual issue. That may be the case also in a Section 9 representation proceeding but would not for that reason require an intermediate report of the hearing officer, even were such a certification not explicitly excepted from Section 554 of the A.P.A." *Id.*, at 1321.

Clearly a § 10(k) decision is not an adjudication and, therefore, does not fall within the scope of the APA.

The § 10(k) decision "binds no one." *NLRB* v. *Plasterers Union No. 79, supra,* at 126. It does not result in a cease and desist order. "Neither the employer nor the employees to whom he has assigned the work are legally bound to observe the § 10(k) decision . . ." *Id.* at 127. The "impact of the § 10(k) decision is felt in the" unfair labor practice proceeding. *Id.* at 126. "This is the design of the Act; Congress provided no other way to implement the Board's § 10(k) decision." *Id.* at 127.[1] A decision which binds no one, whose impact is not felt until an entirely separate proceeding and a subsequent decision in such a proceeding, and which cannot itself be implemented, is not final. As it was not final, § 554 of the APA did not apply and it was not violated. Clearly, in resolving the conflict between the Seventh Circuit and the District of Columbia Circuit, this Court should uphold the District of Columbia, as its decision rests upon a firm foundation of correct statutory

1. The absence of any enforcement procedure indicates that the § 10(k) determination is not final. Like the § 10(k) hearing, a public hearing called by the Secretary of HEW under the Clean Air Act, 24 U.S.C.A. § 1857d(h), does not result in any sanctions for failure to comply with the Board's order. Consequently it has been held that such a hearing is not an "adjudication" subject to the APA. *U.S.* v. *Bishop Processing Co.*, 287 F. Supp. 624 (D. Md. 1968).

construction and greater understanding of the statutory scheme of Congress for the resolution of jurisdictional disputes.

II. Even if, Arguendo, § 554(d) of the APA Applied, It Was Not Violated Because the Hearing Officer Below Did Not Participate or Advise in the Decision.

A. The Board, Not the Hearing Officer, Decided the Case. This Was in Accordance with Board Rules and Long-Established Precedent.

Section 554(d), relied on by the court below, states that an agency employee who performs prosecuting functions may not also ". . . participate or advise in the decision, recommended decision, or agency review . . ." 5 U.S.C. § 554(d) (1970). This language does not apply to a § 10(k) hearing officer, since he does not participate or advise in the Board's decision.

The Board's rules state:

> "Sec. 101.34 Hearing—If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is *nonadversary* in character, and the *primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board.* All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record before the hearing officer. At the close of the hearing, the case is transmitted *to the Board for decision.* The hearing officer prepares an analysis of the issues and the evidence, *but makes no recommendations* in regard to resolution of the dispute." (emphasis added.) 29 C.F.R. 101.34 (1973).

The Board has consistently defined the role of the hearing officer so as to preclude his recommending, participating in, or advising in the § 10(k) decision. For instance, the Board stated:

> "The hearing under Section 10(k) is *non-adversary* in character and conducted in the same manner as a hearing in a representation proceeding. The *primary interest* of the hearing officer, who is acting under the delegation of authority from the Board, is *to insure that the record contains as full a statement of pertinent facts*, as may be necessary for a determination by the Board. *The hearing officer makes no recommendation* in regard to resolution of the dispute, and the charged unions in this case do not refer to any particular ruling of the hearing officer whereby they were prejudiced." (emphasis added). *Local No. 27, International Typographical Union*, 121 NLRB 1013, 1015-1016 (1958).

To the same effect is *National Union of Marine Cooks and Stewards (Irwin-Lyons Lumber Co.)*, 83 NLRB 341, 24 LRRM 1089 (1949).

In *International Longshoremen's & Warehousemen's Union, Local 8 (General Ore, Inc.)*, 124 NLRB 626, 44 LRRM 1445 (1959), the Board reiterated the circumscribed duties of the hearing officer. The Board there noted in reference to another provision of the APA that "it is well established that Section 8 of the Administrative Procedure Act . . . does not apply to a proceeding under § 10(k)." 124 NLRB at 628, 44 LRRM at 1449. The Board described the limited authority of a hearing officer in these words:

> "However, a hearing officer's report in a 10(k) proceeding, as in all representation cases, is in the nature of an interoffice memo and is part of the Board's confidential files. As mentioned before, a hearing officer report contains no recommendations as to the disposition of the issues, nor is it intended to dispense with the independent review by the Board of all the evidence admitted at the hearing, or with the determination by the Board of all the issues raised by the parties at the hearing and in their briefs to the Board. Under Sections 9(c) and 10(k) of the Act, no such responsibility is imposed upon the Hearing Officer, but it is laid upon the Board." 124 NLRB at 629, 44 LRRM at 1449.

It is thus apparent that the hearing officer does not "participate or advise in the decision, recommended decision, or agency review" and that consequently § 554 of the APA does not apply.

The Board's policy is to utilize a hearing officer to preside over a non-adversary, fact-gathering hearing. But the Board itself makes the § 10(k) decision. This is in accord with the legislative aim:

> "But administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes. . . . But Congress, after discussion and consideration, decided to entrust this decision to the Board. It has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by arbitrators, unions, employers, joint boards and others in wrestling with this problem, we are confident that the Board need not disclaim the power given it for lack of standards. Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board." *NLRB* v. *Radio and Television Broadcast Engineers Union, Local 1212*, 364 U.S. 573, 583 (1961).

In executing the responsibilities imposed upon it by Congress, the Board has isolated the hearing officer from the decision-making process.

The Court of Appeals for the District of Columbia in the *Bricklayers* case, 475 F.2d 1316 (D.C. Cir. 1973) felt that great weight should be accorded to the Board's long-standing, uniform interpretation of the Act, to the effect that the APA does not apply in § 10(k) matters:

> "Furthermore, we are faced with an unusually impressive administrative interpretation supporting the conclusion we reach, first adopted by the Board as long ago as 1949 in National Union of Maritime (*sic.*) Cooks and Stewards (Irwin Lyons Lumber Co.), *supra*, repeated in 1959 in

> Local 8, Longshoremen (General Ore, Inc.), 124 N.L.R.B. 626, and until now, we believe, not questioned by courts or Congress. This interpretation of Section 10(k) by the Board is entitled to great weight. [Citation omitted.] It is noteworthy also that in neither NLRB v. Plasterers' Union, No. 79, *supra,* nor NLRB v. Radio & Television Broadcast Engineers Union No. 1212, 364 U. S. 573, 81 S.Ct. 330, 5 L.Ed.2d 302 (1961), was there a hearing officer's recommended decision in the Section 10(k) proceedings there involved, although, we must add, no question in that respect was raised."

B. In View of the Hearing Officer's Limited Authority, He Does Not Materially Influence the Decision.

The hearing officer's primary interest in the non-adversary § 10(k) proceeding is to ensure that the record contains all the pertinent facts. While he does make evidentiary rulings, the Board decides the case. Board Rules, 29 C.F.R. 101.34 (1973). The Board is interested in generally non-controvertible economic facts as illustrated by the Board's Decision and Determination of Dispute in this case. App. 9; 191 NLRB No. 122 (1971). The § 10(k) evidence concerned and the Board relied on such facts as the business of the Employer (App. 10), the labor organizations involved (App. 11), the background of the dispute (*Id.*), the certification and collective bargaining agreements (App. 16), area, employer and industry practice (*Id.*), the skills and training of employees (App. 18), the efficiency and economy of operations (App. 19) and other factors (App. 20).

Since such economic facts are, by and large, objectively verifiable, and since the hearing officer's rulings on evidence are subject to full review by the Board, the hearing officer's capability to influence the outcome of the proceeding, if he were so minded, is considerably less than the Court of Appeals conjectured.

In analogizing the § 10(k) proceeding to representation proceedings for the selection of a bargaining agent under § 9 of

the LMRA, the Court of Appeals in the *Bricklayers* case quoted from the Attorney General's Committee on Administrative Procedure in Government Agencies (Monograph No. 5, S. Doc. No. 10, 77th Cong. 1st Sess., Pt. 5, at 35 n. 141 (1941)) as follows:

> "The need for intermediate reports, to the extent that they provide a method for obtaining the judgment of the trial examiner on issues of fact dependent for their resolution upon the demeanor of witnesses, is rarely present in a representation proceeding. The evidentiary material relates to economic facts such as the nature of the employer's business, the duties of certain employees, and the history of collective bargaining in the plant. Issues of credibility are rarely present." (footnote omitted) 475 F.2d at 1319.

The D.C. Circuit then quoted with approval the following language from *National Union of Marine Cooks and Stewards (Irwin Lyons Lumber Co.),* 83 NLRB 341 (1949):

> "The Board adopted such procedure because the decision in the proceedings under Section 10(k) is a preliminary administrative determination made for the purpose of attempting to resolve a dispute within the meaning of that section; the unfair labor practice itself is litigated at a subsequent hearing before a Trial Examiner in the event the dispute remains unresolved. It is to the subsequent adversary hearing, which leads to a final Board adjudication, that Section 8 [Section 557] of the Administrative Procedure Act applies." 475 F.2d at 1320.

In light of the hearing officer's very limited role, he cannot be said to participate in the agency decision and, therefore, § 554(d) of the APA does not apply.

III. The Opinion Below Would Thwart the National Labor Policy Seeking Prompt Resolution of Jurisdictional Strikes.

If, as the court below assumed, the § 10(k) hearing is to be treated as an adjudication, then significant, time-consuming consequences would result. The APA requires that the presiding officer must be an administrative law judge (5 U.S.C. § 556(b)(3)), that he file a recommended or initial decision (5 U.S.C. §§ 554(d) and 557(a)), and that the parties have an opportunity to submit proposed findings of fact and conclusions of law prior to the recommended decision and exceptions to that decision (5 U.S.C. § 557(c)). None of these requirements is followed in current Board practice.

Since the result of an adjudication is the whole or a part of a "final disposition," 5 U.S.C. § 551(6), (7), the aggrieved party would also have to be permitted to appeal from the § 10(k) decision, for the LMRA provides that "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals . . . ." LMRA § 10(f), 29 U.S.C. § 160(f) (1970).

It is obvious that these additional procedures and appeal would result in vastly increasing the time involved in resolving jurisdictional disputes, contrary to the intent of Congress in enacting § 10(k). In the present case, 17 months elapsed between the final decision of the Board in the unfair labor practice case (June 22, 1972) and the order of the Court of Appeals denying the petitions for rehearing (November 26, 1973) App. 2. If there were added to this the time required for proposed findings of fact or exceptions, plus the additional appeal from the § 10(k) decision, the present procedure would be extended for additional months or years while jurisdictional disputes would drag on.

As the Court of Appeals observed in the *Bricklayers* case:

> "In the first place there is need obviously, for as expeditious a resolution of the jurisdictional dispute as is reasonably possible." 475 F.2d at 1321.

The legislative history of § 10(k) supports this obvious conclusion. In enacting § 10(k) Congress departed from the statutory scheme of relying solely on unfair labor practice procedures to control undesirable conduct. To be sure, Congress established a new unfair labor practice in § 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D) (1970), but it did not stop there. It added § 10(k) for the purpose of expediting resolution of jurisdictional disputes.

The Senate report noted that "Time is usually of the essence in these matters. . . ." S. Rep. No. 105, 80th Cong., 1st Sess., p. 8, Leg. Hist. 414. Thereafter, a provision in the Senate-approved bill to try jurisdictional disputes before an arbitrator was deleted. Instead, what are now LMRA §§ 10(j),(k) and (l) which include the availability of quick injunctive remedies were passed, 29 U.S.C. §§ 160(j), (k) and (l) (1970). Section 10(k) allows the parties only ten days to adjust or agree upon voluntary methods for adjustment, 29 U.S.C. § 160(k). Sections 10(j) and (l) allow injunctive relief by the Board "where such relief is appropriate" or "just." 29 U.S.C. §§ 160 (j) and (l). Thus Congress expected to provide "a rather quick and decisive remedy" for dealing with jurisdictional disputes. Senator Ellender in colloquy with Senator Morse, Leg. Hist. 1057-8.

The court below ignored the obvious consequences of its decision. To lengthen such proceedings by requiring an intermediate report, and by giving the aggrieved party two appeals to the Court of Appeals, one after the § 10(k) decision and one after the unfair labor practice decision, would defeat the Congressional goal of speed by unduly extending the time in which an employer would be subject to pressures from jurisdictional strikes.

IV. Local 134 Was Barred from Asserting in This Proceeding the Alleged Failure to Conform to the APA, Having Failed to Raise That Objection at Any Stage of the § 10(k) Hearing.

At no time during the § 10(k) proceedings did Local 134 contend that the APA was applicable. Yet, if § 554(d) were held to apply to the § 10(k) proceedings, then § 556 of the APA (5 U.S.C. § 556(a) (1970)) also would have to apply as the court below held, App. 70, and under that section the Board would have been required to appoint a Trial Examiner or Administrative Law Judge to conduct the hearing. Somewhat inconsistently the court below stated:

> "We assume that the § 10(k) hearing officer in this case is the equivalent of a hearing examiner for purposes of § 556, inasmuch as the statute so requires and no point was made of any distinction, either at the hearing or on appeal." App. 70, n. 3.

But this assumption of the court was incorrect. The record shows that the person who presided at the § 10(k) hearing was a regional office staff attorney designated as "hearing officer" and not a Trial Examiner or Administrative Law Judge as required by § 556 of the APA. Yet Local 134 never raised this objection at any time in the course of the § 10(k) proceedings. Local 134 should have urged the alleged APA violations before the Board at that time, and if the § 10(k) decision was final Local 134 should have at least attempted to appeal to the Court of Appeals.

The LMRA states:

> "No objection that has not been urged before the Board, its members, agent or agency, shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e) (1970).

This Court has spoken unequivocally and clearly:

> ". . . [O]ur cases have uniformly held that in the absence of a showing within the statutory exception of 'extraordinary circumstances' the failure or neglect of the respondent to urge an objection in the Board's proceedings forecloses judicial consideration in enforcement proceedings." *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961).

It is therefore clear that Local 134 is foreclosed from raising the issue of the applicability of § 556(d) of the APA, because of its failure to urge that matter before the Board; indeed, the statute itself states that such objection shall not "be considered by the court." 29 U. S. C. § 160(e) (1970).

V. Even if, Arguendo, § 554(d) of the APA Applies, There Was No Prejudicial Commingling of Judicial and Prosecutorial Functions and Consequently No Reason to Deny Enforcement of the Board Order.

A. At the Time of the § 10(k) Hearing the Hearing Officer Did Not Know He Would Later Be Appointed to Serve in a Prosecuting Role.

The Court of Appeals for the Seventh Circuit concluded that the Board violated § 554(d) of the APA because the hearing officer in the § 10(k) proceeding subsequently served in a prosecutorial capacity at the unfair labor practice hearing. App. 71. Section 554(d) provides that, "[A]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review. . . ." 5 U.S.C. § 554(d).

To overcome the doctrine of harmless error, the court then attempted to demonstrate that this alleged violation of the APA had resulted in harm or prejudice to Local 134. The court sought to find such harm by this reasoning:

> "We think that the *knowledge* on the part of the presiding officer that he will *subsequently* advocate a position based upon his own evidentiary rulings at the § 10(k) hearing could very well influence his decisions at that hearing." (emphasis added) (App. 71.)

The court incorrectly assumed that the hearing officer knew, at the time of the § 10(k) hearing, that he would later be assigned to prosecute an unfair labor practice case against Local 134, but there is absolutely no evidence in the record to support such a conclusion. Indeed, under the scheme of the Act and the Board's established procedures, the hearing officer could not possibly have known at the time of the § 10(k) hearing that he would subsequently be assigned to try such a case against Local 134. He could not have known for each of the following, compelling reasons:

1. The § 10(k) hearing was concluded in March, 1971. At that time, the hearing officer's connection with the case was concluded.

2. The Board itself had to determine whether Local 134 or CWA was entitled to perform the disputed work. At the time of the § 10(k) hearing, the hearing officer could not know whether Local 134 or CWA would be awarded jurisdiction of the work. The Board's decision was handed down on June 30, 1971, long after the hearing officer's connection with the case had terminated.

3. Thereafter Local 134 filed a motion for reconsideration in July, 1971. This was denied.

4. Even at this point, there was no unfair labor practice complaint issued against Local 134. Local 134 had the option of complying with the Board's decision or rejecting it. Not until Local 134 itself elected to reject the Board's decision did the General Counsel issue a complaint, initiating the unfair labor practice trial. The complaint was issued on September 10, 1971. (Only the General Counsel can issue a complaint under the Act, 29 U.S.C. § 153(d).)

5. Only at this point, after the issuance of a complaint, long after the hearing officer's connection with the § 10(k) hearing had terminated, could any of the parties or any of the Board's staff, including the hearing officer, know that there would be an unfair labor practice hearing against Local 134.

7. It was at this time, and not before, that an attorney was selected to prosecute the unfair labor practice complaint against Local 134. By chance, the attorney selected had presided at the § 10(k) hearing. The unfair labor practice hearing was held on November 4, 1971, before an Administrative Law Judge with no previous involvement in the case.

Thus, it is clear that at the time of the § 10(k) proceeding in March, 1971, the hearing officer did not have and could not have had "knowledge" that he would in November "advocate a position based upon his own evidentiary rulings."[2] A noted authority on administrative law has declared:

> "The occasional practice of assigning a single officer to preside at the hearing and to develop the facts becomes harmful only if the officer tries to build a case on one side and then later has to pass upon the extent of his own success." K.C. Davis, 2 *Administrative Law Treatise* § 13.07 (1958).

Significantly, even Local 134 never claimed in its brief or argument in the Court of Appeals that the hearing officer knew at the time of the § 10(k) hearing that he would later be assigned to the unfair labor practice case. Yet, with no foundation in fact, the opinion below attributes such knowledge to the hearing officer and predicates the denial of enforcement on this extraordinary error.

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2. The Court of Appeals relied upon *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950). App. 69-70. That case turns on the judicial bias of a hearing officer who has at once the responsibility of appraising a case and also of seeking to make it as strong as possible. That case is inapplicable to our facts since the § 10(k) hearing officer had no psychological stake in the outcome of the case.

B. Since the Judicial Function Was Fully Neutral and Untainted, There Was No Prejudice to Any Party, and No Justification for Denial of Enforcement of the Board's Order.

It should be noted that Local 134 never claimed, and the Court of Appeals never found any *actual* impropriety in the conduct of the § 10(k) hearing officer. The hypothetical impropriety found by the court is based entirely upon a misunderstanding of the facts. Local 134 was not in fact denied a fair hearing. It was not prejudiced. If Local 134 was not prejudiced, why should the unfair labor practice trial before the Administrative Law Judge, and the decision of the Board all be overturned? Enforcement of a Board order should not be denied for minor mistakes or trivial irregularities. See *NLRB* v. *Mattison Machine Works*, 365 U.S. 123 (1961), where this Court said: "In the absence of proof by the employer that there has been prejudice to the fairness of the election such trivial irregularities of administrative procedure do not afford a basis for denying enforcement to an otherwise valid Board order."

Section 10(a) of the LMRA empowers the Board to "prevent any person from engaging in any unfair labor practice . . . affecting commerce." 29 U.S.C. § 160(a) (1970). The Board found that an unfair labor practice was committed by Local 134. The Court of Appeals agreed that Local 134 had violated the LMRA. App. 67-68. Since the only stated reason for the court's refusal to enforce the Board's order was a misunderstanding of the facts, and since the alleged commingling of functions, even if it occurred, violated the APA only in a technical and harmless manner without prejudice to any party, the Board's order should be enforced.

CONCLUSION.

We respectfully request that the decision of the Court of Appeals be reversed insofar as it denied enforcement to the Board's order; and that the Board's order be affirmed and enforced.

Respectfully submitted,

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APPENDIX 1.

LABOR MANAGEMENT RELATIONS ACT,

29 U.S.C. § 151, et seq. (1970).

29 U.S.C. § 153

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

29 U.S.C. § 158(b)(4)(ii)

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

29 U.S.C. § 160

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State of Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

29 U.S.C. § 160

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it

the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

29 U.S.C. § 160

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith thereupon transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

29 U.S.C. § 160

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor

practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

29 U.S.C. § 160

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

29 U.S.C. § 160

(*l*) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b) (7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injuntive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such

injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 158(b) (7) of this title if a charge against the employer under section 158(a) (2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organizations and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b) (4) (D) of this title.

APPENDIX 2.

ADMINISTRATIVE PROCEDURE ACT,

5 U.S.C. § 551, et seq. (1970).

5 U.S.C. § 551

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

5 U.S.C. § 554

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

5 U.S.C. § 556

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

APPENDIX 3.

RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD, SERIES 8, AS AMENDED.

29 C.F.R. § 101.34

SEC. 101.34 HEARING.

If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board. All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record before the hearing officer. At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute.